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In The
SUPREME COURT OF THE UNITED STATES

JAMES R. RUSHING, JR.
PETITIONER

Versus

LAWRENCE KELLY, Superintendent, and JIM HOOD, Attorney General of Mississippi

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

James R. Rushing, Jr.
Pro Se
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Meridian, MS 39301
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QUESTIONS PRESENTED FOR REVIEW

Brief Introductory:

James R. Rushing, Jr. argues the circuit court should have granted a Certificate of Appealability on the issue of insufficient evidence to convict of forcible/non-consent rape because on his direct appeal, the Mississippi Supreme Court should have reversed and rendered. He also argues that such a Certificate should have been issued on his ineffective counsel claims centering on counsel not utilizing the evidence available to destroy proof on the element of force/lack of consent, most of which were inconsistent statements and actions of the victim contained in part in medical reports and police questioning of the victim showing victim's exaggerated trial testimony of violence hours before the sex and failure to prove the long-term relationship of Rushing and the female beneficial to the female were of such a critical nature. Had counsel presented such evidence at trial a different result was probable, especially likely when considered in light of the trial testimony.

1. Whether a Certificate of Appealability should have been issued on the sufficiency of the evidence at trial and at the State post conviction collateral hearing because such evidence did show insufficient proof of the "force/no consent" element of forcible rape.

2. Whether a Certificate of Appealability should have been issued on the ineffective counsel claims because the claims show actual innocence and undermine confidences in the verdict of guilty.

PARTIES TO THE PROCEEDING

The Parties are identified in the caption.

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THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN A CASE MAKING A GOOD SHOWING OF INSUFFICIENT EVIDENCE AND ACTUAL INNOCENCE AT THE JURY TRIAL AND SUCH INNOCENCE AT THE STATE COLLATERAL RELIEF HEARING ON RECANTATION IF COUNSEL HAD PRESENTED AT TRIAL ALL THE EVIDENCE AVAILABLE, ALL THUS REQUIRING A CERTIFICATE OF APPEALABILITY

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Petitioner herein respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit denying a Certificate of Appealability entered in that Court on March 26, 2009, with reconsideration denied on April 29, 2009.

OPINIONS BELOW

The decision of the district court is not reported. The decision of the Court of Appeals is not reported. Direct appeal of the Mississippi trial court verdict and judgment is found in **Rushing v. State,** 753 So. 2d 1136(Miss. App. 2000), cert. den. April 27, 2000. Appeal of Mississippi Post Conviction after evidentiary hearing on victim recantation issue is found in **Rushing v. State**,873 So.2d 116 (Miss.App.2003), cert den. May 20, 2004.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeals on reconsideration was entered on April 29, 2009. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. Sec. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America

Amendment XIV(Appendix, p. 4)

Amendment VI(Appendix, p. 4)

Anti-terrorism and Effective Death Penalty Act

28 U.S.C.A. § 2241 (Appendix, p. 4)

28 U. S. C. 2253(c)(1)(Appendix, p. 5)

28 U. S. C. 2254(d)(Appendix, p. 5)

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§ 97-3-65(1997 version)(Appendix, p. 6)

STATEMENT OF THE CASE

Proceedings Below

At the district court level, Rushing's Petition for Habeas Corpus was dismissed on the merits, without any hearing, when the district judge accepted the Magistrate's Report and Recommendation. That Report is in the Appendix at pages 8 - 41.

Magistrate's Report is an accurate history of the issues raised by Rushing on his direct appeal to the Mississippi Supreme Court, the content and issues of his State post conviction collateral relief petition, the issues raised on appeal to the denial of that collateral relief and the grounds for habeas corpus filed in the district court.

The Honorable District Judge by Judgment (Appendix, p. 7) on March 14, 2008, having accepted the Report and Recommendation of the Magistrate Judge dismissed the habeas petition with prejudice.

Rushing filed a Notice of Appeal which was treated by the district judge as Application for Certificate of Appealability which was denied and Rushing filed a Motion for Certificate of Appealability in the Circuit Court of Appeals. That Motion was denied by a single judge of that court on March 16, 2009(Appendix, p. 1) and reconsideration was denied by a panel of judges on April 29, 2009. (Appendix, p. 3)

The Motion for Certificate of Appealability was sought on insufficient evidence and ineffective assistance of counsel.

The Magistrate's Recommendation, at Appendix, p. 27, concluded that on direct appeal the Mississippi Court of Appeals(certiorari denied by Mississippi Supreme Court) had applied the same standard to the evidence as envisioned by Jackson v. Virginia, 443 U.S. 307, 319 (1979) and that the State court's decision was not an "unreasonable application of Jackson to the facts".

The Magistrate's Recommendation (Appendix, pp. 27-34), noting Rushing's state collateral relief petition had been rejected by the Mississippi Supreme Court without revealing the basis for rejection and adding that the Magistrate knew the state court applied Strickland v. Washington, 466 U.S. 668 (1984), concluded the evidence

presentation defaults of counsel were covered by the presumptions of competency and strategy and thus the State court's application of "clearly established" law of Strickland was not an "unreasonable application" of Strickland. As to the witnesses not called by Rushing's trial counsel, the Magistrate referenced how such claims were "disfavored" in federal habeas because speculation as to testimony.

As to Rushing's ground of "actual innocence", the Magistrate(Appendix, p. 38-39), limited that principal to the "gateway" to avoid procedural default. Herrera v. Collins, 506 U.S. 390, 400, 404(1993).

As stated earlier, the district court relied upon the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. 2254(d) (2002) language authorizing habeas relief only if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ." The Magistrate cited Robertson v. Cockrell, 325 F.3d 243, 247-48 (5th Cir. 2003) (en banc).

Though the Magistrate quoted both (1) and (2) of Section 2254(d), it never utilized subpart (2), which states:

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Rushing says that at the collateral relief hearing, limited to recantations of the victim, such subpart (2) should have been applied and it would have justified a finding of "actual innocence" and thus a hearing should have been held in the district court.

Sufficiency of Facts to Support Forcible Rape
Record at State Jury trial.

Here Rushing refers the Court to the trial testimony of Marilyn Lynch, which was quoted in the Opinion of the Mississippi Court of Appeals, Rushing v. State, 753 So. 2d 1136, 1152-1157(Miss. App. 2000) in state appeals Judge

Irving's dissent where he concluded that the rape conviction should be reversed and rendered, which dissent was joined in by Judge Thomas. The prose portion of Judge Irving's dissent relevant here is as follows:

> ¶73. Based on M.L.'s testimony, the most that can be said is that she apparently reluctantly consented at first but actively participated in the sexual encounter. Reluctantly doing something is not one and the same as being forced to do something. At no point did Rushing ever physically persist after being told "no".
>
> ¶74. The majority quite properly acknowledges that one of the elements of rape is that it must occur without consent and by force. The majority then attempts to explain that the State's proof satisfied this element. The majority, relying on Stewart v. State, 466 So. 2d 906 (Miss. 1985), reasoned that "proof that Rushing used additional contemporaneous force to have sexual intercourse with M.L. is unnecessary if the evidence establishes that she surrendered because of fear arising out of a reasonable apprehension of great bodily harm." I agree that this reasoning comports with the law in cases such as this. However, M.L.'s own testimony establishes that she consented not out of any apprehension of great bodily harm but out of a realization that Rushing would stick around a little longer until she did what he wanted her to do. The sexual intercourse occurred some six or more hours after the beating at the club. In the interim, M.L. and Rush had slept in the same bed without incident. It should be noted that when Rushing and M.L. returned to the trailer from the club, Rushing brought up the subject of having sex. M.L. told him she did not want to do so, and he and she both went to sleep. It was not until later that morning when he awoke and started making advances again that she finally agreed to his entreaties. The only logical conclusion, it seems to me, that a fairminded juror could draw is that these two lovers, with a five year

relationship, were simply making up, although M.L. had undeniably suffered what had been an unjustifiable and savage beating a few hours earlier. It is hard to extract any other conclusion from M.L.'s testimony in light of how they had sex and her concluding statements: "Well, after oral sex, I got on top of him and we had sex the way we usually do. Well we always had sex that way. I was always on top."

The majority of The Court of Appeals accepted the argument of the State that Lynch remained in terrifying fear as she slept with Rushing, talked on the phone with her friends, saw her son, Ray, as he left for work, all before Rushing awoke about 9:30 or 10:00(T 118, RE246) and started to sexually arouse Lynch, and during the interruption by the electric power meter employee Tom Johnson. The Court of Appeals disregarded Lynch's statement to Detective McElhenney that there was no sexual assault and took the position that the severity of the assault at the Club, as seen in the photographs of Lynch's body with its multiple bruises, excused new force or threat of it.

(Note: Explanation of code references to State Record: "T" refers to the jury trial transcript found in District Court Record(DCR)Volume II-12 and "H" refers to the PCCR Hearing Transcript, which is DCR II-7. "RE" when associated with a "T" number refers to the Record Excerpts on the appeal of the Jury Trial, found in DCR II-9; "RE" when associated with a "H" number refers to Rushing's Appellant Record Excerpts in the PCCR which are found in DCR II-5, pages 1-117 and DCR II-6 for pages 118-274; Lynch's deposition is DCR II-1).

At trial the only medical evidence was testimony(T137-143,RE268-274) of Nurse Paula Strickland on the rape kit session at Riley's Hospital ,Lynch returning to the E.R. after her 1 hour interview with Detective McElhenney, which ended about 11:15 A.M.(T154, RE262) (note: "T" refers to trial transcript while "H" refers to the PCCR hearing transcript.) The physical assault E. R. visit

was from 6:04 A.M. to 9:25 A.M., without mention of rape to the Doctor nor to Detective McElhenney when he had come over about 6:30. The medical reports(CP31,RE56), not even mentioned at trial, were Exhibit "B" of the State PCCR Motion for New Trial(CP1,RE26). The medical showed only one mark on her left temple(CP31,RE56) but Lynch testified(T61,83,RE189,211) Rushing hit her on the head many times. The medical reveals Lynch told Dr. Reinshagen she "passed out briefly 3 times." She told Detective McElhenney (CP31,RE56), she "lost consciousness" at the club and "then when I got home." (CP28,RE53)

Record of State Post Conviction Collateral Relief Proceedings

Rushing submitted to the Supreme Court his Motion for Leave to file a Motion for New Trial(CP1-24,RE26-49) on several issues, including ineffective assistance of trial counsel, but the Court only ordered an evidentiary hearing on the issue of recantation (CP173,RE91) because Lynch had given 2 affidavits, February 26, 1998(CP47,RE72) and October 3, 2000(CP55, RE80), and a deposition (RE118) attended by her own counsel, where she denied a rape had occurred and admitted she had lied and exaggerated the circumstances. After state postconviction evidentiary hearing was ordered on recantation, the District Attorney, Hon. Bilbo Mitchell, obtained an Affidavit from Lynch (CP174,RE92) dated August 20, 2001, which purported to explain her July 26, 2000 recantation deposition.

At the hearing on September 19, 2001,admitted into evidence were various Affidavits of Lynch: February 26, 1998(RE116), October 3, 2000(RE159), October 17, 2000(RE162), August 20, 01(RE164), and her deposition. A video (RE161) of that deposition is in the state court record and Rushing urges the Court to view the same for content and credibility.

Lynch was subpoenaed by Rushing, but since the D.A. had brought Lynch into his office, purportedly on August 16 and August 20, 2001, and she had reaffirmed

her trial testimony, and refused to talk to post conviction counsel, William Waller, Sr., Mr. Waller didn't call Lynch to testify. Neither did the D.A. Mitchell. During direct examination, the D.A. objected to hearsay statements of Lynch. After the judge established that Lynch was in the courthouse and available(H20-21), he allowed Mr. Waller to ask Holt, Attorney Williams and Rushing about what Lynch had told them. The trial judge disallowed testimony about the trial evidence.(H23-25, 28,29) When Rushing attempted to introduce love letters(RE103-113) from Lynch to Rushing in prison, after the conviction, objection was sustained at H26-27. At H 31, Mr. Mitchell, asking Rushing whether his friends had been calling and pressuring Lynch, said: *"You will hear that when she testifies later.* Are you aware she came into my office and when I had to ask her about this that tears came to her eyes and she cried again about you raping her?" At H 91, the court again sustained objection to the love letters saying *"She can testify about them herself,"* whereupon Mr. Waller wasn't allowed to explain why he wasn't going to call her, nor to make a proffer.(H92). During direct of the D. A.'s Investigator Louis Robbins, hearsay objection to Lynch's statements at the D.A.'s office was first sustained, but after Mr. Mitchell remonstrated that Mr. Waller had been allowed to give Lynch hearsay, objection was overruled.(H93-94)

In an Order Denying Motion for PCCR(CP211,RE6), Judge Bailey revealed he had made "a full examination of the Motion, together with all the files, records, transcripts and correspondence, argument of counsel and briefs of the parties."

The state trial judge, in relevant part, gave his Opinion:

> This court has considered the trial testimony of the victim, along with her recanted testimony contained in the affidavits submitted and the deposition taken, as well as the affidavit she provided to the District Attorney. The Court is confident that she testified truthfully at trial and in her affidavit made on August 20, 2001. The victim ***stated in her affidavit*** that she was tired of the calls she was

> receiving and that she could not live with herself if she did not tell the truth. The court is also of the opinion that the victim bent to pressure from the petitioner and others in recanting her trial testimony. This court does not know ***what the victim would have stated*** had she been called to testify at the evidentiary hearing and will not speculate to ***what she might testify***. The court is of the opinion that(CP217,RE12) the recanted testimony is material, but that ***because the victim has now stated*** that it was in fact rape, along with her reasons for recanting her testimony and ***because she did not testify at the evidentiary hearing***, the petitioner has not proven that a different result would be reached if a new trial were provided. Therefore, the motion for new trial is hereby denied.(CP218, RE 13) (writer's emphasis and, note, all emphases hereafter are those of the writer.)

Because the Judge had allowed Lynch's statements at the August 2001 affidavit session at the D.A.'s office but the D.A. had not called her, Rushing filed a motion for Reconsideration (RE93,CP219) and Attorney Williams, resuming representation of Rushing prior to the reconsideration hearing supplemented the record with his post-hearing Affidavits from Lynch(RE165), Attorney Leslie C. Gates(RE174), Eddie Holt(RE172), appeal co-counsel Ross Barnett, Jr.(RE176) and Mr. Waller(RE168). The Judge, remarking(H123) that he could not have called Lynch to testify, refused to allow the affidavits, exclaiming that the trial photographs showed "he beat the ever living Hell out of the victim".(H128) Attorney Williams, Eddie Holt and a notary went to Lynch's home on February 13, 2002 and she signed an affidavit saying there was "no rape" and adding in her own handwriting "There was no force". On December 12, 2001, Williams had taken Attorney Gates with him to Lynch's home and Gates' Affidavit(RE 174) reflected Lynch said she made only one visit to the D. A.'s., adding she was not intimidated and the deposition, trial testimony and her August 2001

Affidavit were all true. Lynch told Williams and Gates that Rushing did not force her to have sex and she didn't tell the Police Rushing forced her. The Police wanted to charge rape. She didn't. Right after the September 19, 2001 hearing Eddie Holt (Affidavit RE172) visited Lynch and, when Holt told her they said she had been to the D.A.'s office twice, she said, "them folks lied". However, on February 13, 2002, Lynch refused to sign an affidavit to that effect. Rushing's Affidavit showed why Mr. Waller did not call Lynch to testify.(H123, RE 167) Lynch had told Rushing she would not go to jail for anybody; not do anything to hurt her or her children and had refused to speak to Mr. Waller. At the hearing, Mr. Williams pointed out(H128) that Lynch had not cried at the trial, which was not contradicted. The Judge(H128-129) said the jury verdict was based on physical evidence(H129), thus the photographs, these being the only such evidence.

Critique of PCCR Hearing Testimony/Exhibits

The testimony at trial and PCCR on the sex was all words. Every word spoken and each phrase carries more weight and truth than revealed on the surface and by a cursory reading. Two examples pregnant with the truth are: (1)during the McElhenney interview(CP28,RE53), Lynch, when asked, "Did he detain you ***against your will*** last night?" answered: "***When we were at the club, yeah.***" and (2)in Lynch's August 20, 2001 Affidavit she admitted she was "feeling a little guilty for Mr. Rushing". The judge found Lynch was "pressured" to give the recantation affidavits and the July 2000 deposition, but the word "pressure" is not in the D. A.'s affidavit. The affidavits at reconsideration contradict the two-visit testimony and undermine the free-will character of the D. A.'s August Affidavit.

The PCCR Exhibits

Exhibit "A" was the Detective McElhenney interview with Lynch and internal Police Memos, both of which the trial jury did not see. The interview is quoted here(CP28,RE53), starting with McElhenney's question "Did he sexually assault you?":

Q. ***Did he sexually assault you?***

A. No.

Q. ***Did you ever loose consciousness*** at any time while you were ***in the Club?***

A. Yes, and twice when I got home.

Q. What did he hit you with?

A. To me it looked like the big end of a pool stick that was broken.

Q. Did you ever at any time ask or try to leave the Club?

A. He was not going let(sic) me go. He told me that he was going to beat me until he was satisfied, then he was going to take me to the hospital and then coming(sic) to make his bail.

Q. What time of gun did he threaten you with?

A. It looked like a .357 with a long barrel.

Q. Where does he keep the gun?

A.He got it from underneath the cash register last night.

Q. Where did the stick come from?

A. Under the counter, under the bar.

Q. Did he detain you against your will last night?

A. When we were at the Club, yeah.

Q. Did you try to defend yourself against him?

A. Yes, I did. Every time I threw my hand up, he said that he would hit me in the head.

Q. Do you wish to sign charges on James R. Rushing?

A. Yes.

(***Note: Some space occurs at this point in the Exhibit***)

Q. Do you have anything else that you want to add?

A. Back to that sexual assault question, well, he asked me did I feel like fucking, and I told him no. ***When he helped me back into the bed***, he started feeling on me and stuff. Then he went to sleep. When he woke up this morning, he asked me did I feel like fucking and I told him no. ***I pushed his hands off of me and he stopped.*** Then he turned back over and told me that he was going to fuck me before he left ***even if it was the last time. Then we had sex***. I stopped and he said "don't be

half fucking me." He asked if I really didn't want to do it and I told him no. He started playing with my vagina and I pushed his hand back and ***he told you to stop. So after that I performed oral sex on him.*** He was pushing my head down. ***Then we had intercourse.*** He wanted to have anal sex but I told him no and we did not do it. ***He was trying to stick his penis in my anal(sic) and I told him no.*** He told me that I have go to cum somewhere. ***We had vaginal sex.*** I was on top and he ejaculated in my vagina. He then went to the bathroom and he washed up and then put on his clothes and said that he was fixin(sic) to go. He then left.

At trial the above extra space was not even mentioned though McElhenney's separate memo(CP30,RE55) says: "During the statement of Marilyn Lynch ***I found out that a rape had also occurred***". That surely is the reason for the *extra space.* Then he contacted Lieutenant Johnson, to help interview Lynch about the sex.

Exhibit B was the medical records on the assault examination done between 6:04 P.M. and 9:25 P.M.(CP31,RE56) and the rape kit (CP35,RE60)done from 11:20 to 12:41. Significantly, Lynch at the assault exam told Dr. Gerald Reinshagen she had "passed out briefly three times." Returning to the E. R., Dr. Reinshagen reports: "(Lynch)states was assaulted by the father of her child and he penetrated her vagina with his penis and ***attempted to penetrate her rectum.***" Triage assessment shows: "Pt. was assaulted earlier by ***'by the father of my child'*** early tonight. Then went to police station and told police that ***'he attempted to have anal sex with me'*** and I refused." Dr. Reinshagen's Diagnostic Impression was ***"alleged rape"*** with "***No signs of trauma in vaginal or anal area***. At 12:20, the Nurse's Notes reflect "...***crying but calm, complains of being sore all over."*** Lynch, after the E.R. assault visit, was only told to take "Advil for pain relief", but, after the rape kit, she was prescribed 800 milligram Motrin. **Exhibit "C"** was Tom Johnson's affidavit who testified at the evidentiary hearing.(H85) **Exhibit "D"** was Lynch's Affidavit(CP47,RE72) given to Attorney Ross Barnett, Jr. in her home on February 26,

1998. She struck out the typed parts that said (1)she didn't pass in and out of consciousness, (2) he didn't hit her on the head, (3)that he was merely "paddling her" and (4)that he hadn't pointed a gun at her. Lynch wrote in: ***"I have had time to think back on things that happened that night and I may have overstated some. I want my son to get to know his father."*** The typed conclusion said: ***"I said a lot of other things at trial to make a strong case against James Rushing. I should not have done this."*** In that Affidavit, Lynch contradicted her trial testimony by swearing: (1)He did not hit her to cause serious injuries; (2)the sex was by consent and voluntary;(3) he did not make her take clothes off; (4) she stumbled to the floor (5) she didn't need any help and (6) she was not afraid of Rushing. **Exhibit "E"** and **Exhibit "F"** not relevant. **Exhibit "G"** is the October 3, 2000 Affidavit of Lynch((CP 55, RE80), saying that after getting rid of Tom Johnson, ***"I got back into bed and continued to make love to James for the next hour"***. **Exhibit "I"**, Affidavit of Terry Collier(CP99, RE83), close friend of and first to see Lynch at the trailer about 4:00 P.M., swore Lynch ***"had "never conveyed to her that she had been raped."***

The Lynch August 20, 2001 Affidavit given in the D.A.'s office, is as follows:

> I, Marilyn Lynch, having been duly sworn, do affirm that the testimony I gave in the trial against Mr. Rushing was the truth and **happened as I stated it.**
>
> The **deposition** I gave to Mr. Rushing's attorney was given **because I was feeling** sorry and **a little guilty for Mr. Rushing**. I was tired of all the phone calls I was getting day and night just about every day until my phone was turned off. **His friends were** always asking why I did it and **trying to make me feel bad**. But **after thinking long and hard** about it, **I couldn't live with myself if I told a lie** and changed my testimony. **At least now I still have my self-respect and dignity** for sticking with the truth.
>
> **I'm sorry for any** inconveniences or **problems I**

may have caused anyone for giving that deposition.

The PCCR Hearing Testimony

Lynch's Deposition was admitted without objection(H44), Exhibits 6 and 8(video). She bruised easily, from just leaning on her elbows on the table.(RE127-128) At the club they "got in a fight".(RE128) She hit Rushing with her hand, got the stick, didn't hit him and, as he took it(RE129-130) they tussled and she fell to the floor.(RE130) She refused a cab and he took her home.(RE131) Rushing asked for sex after they got in the trailer and she said "No". They went to sleep in the same bed.(RE134-135) The telephone was on the dresser about ten feet from the foot of mattress(RE135) and after 7 a.m. either her sister Nonie Hall or her son's ride called. Her friend(Terri Collier) called and Nonie called again and may have awakened Rushing.(RE137-138) Ray left about 8:00 and Rushing started touching and rubbing her. She told him she didn't want to but he kept on and so, "we had sex."(RE141) After Tom Johnson, "we went back and we continued having sex."(RE142) About the Detective McElhenney interview:

> "And then they asked me was there any sexual–did we have any sexual–-I told them yea, we had sex. ***And they asked me did he force me. I told them no he did not force me.*** And that, you know, I had sex with him because I wanted to have sex with him. And I told them he did not force me to have sex. And I did not tell them that he raped me....***they kept asking the people when I went to the emergency room*** was there –had they done any x-rays, ***was there any ones broken*** or anything like that. And when they–and ***when I went to give my statement,*** I had ***my finger was broken. And they said they were going*** to ***charge him with aggravated assault, because of the broken bone.***(RE143)...And ***then one of the detectives,*** I don't remember, ***made the statement*** to the effect that, well, if we can't get him for what we want him for, ***we'll get him for whatever we can.***"(RE144)

She swore the sex was by consent.(RE146-147) Because Nonie and Ray wanted to get guns and go after Rushing, Lynch pressed charges.(RE150-151) As for the sex, ***"It was not forced. It was not – it was regular sex the way we usually have sex....No, we ain't have no oral sex....***(RE152) She re-affirmed her February 26 affidavit that the injuries weren't such to make it aggravated assault. About the deposition, she said,

> ***"I am doing this on my own." "I was not forced, coerced or, threatened in any kind of way to make this deposition."*** (RE144)...(Asked whether she wanted to add anything,) ***"No, I just wanted to do this. Everything I am saying is true. And I want to make definite that they know that I was not forced, coerced or threatened in any kind of way to make this deposition. And I am just doing it to set the record straight."***(RE155)

There is substantial evidence that the trial testimony of no consent sex was a lie and the recanting affidavits and the solemn deposition are the truth. Lynch's interview by Detective McElhenney shows it, enlightened by Lynch's deposition that the police converted consensual sex into a rape. The medical evidence and the interview show Lynch "passed out briefly three times", once at the Club, once at the door of the trailer as shown by Lynch's trial testimony and once as she went to the bathroom and returned to Rushing's side in bed. The medical shows only one mark on Lynch's left temple, not, as she testified, multiple hits to the head and knots all over her head. The medical shows no bruises from "stomping or kicking". The pain at the rape kit E.R. visit at 11:00 A.M. whereby Lynch got a prescription for Motrin 800 milligrams, is exaggerated, since at the 6:04 to 9:25 A.M. assault E.R. visit, she was only advised to take Advil. Lynch's deposition shows she bruised easily, just from her upper body weight as she rested her elbows on a table. Immediately beginning to recant the trial testimony by an Affidavit taken by Jackson Attorney Ross R. Barnett, Jr. on February 26, 1998 Lynch compromises the weight of the evidence, when she in her own handwriting and as typed at the end, said she exaggerated the facts at the trial. This

February Affidavit was given to the D.A.'s office in the Spring of 1998. At the July 26, 2000 deposition, she again recounted that the sex was by consent and that a rape charge was the creature of the Detective. On October 3, 2001, Lynch signed another Affidavit saying the sex was "love making", which she resumed after getting rid of electric power man Tom Johnson who knocked on the door about 11:00, Rushing having awakened at 9:30 or 10:00 to resume his foreplay and requests for sex. At the trial, on re-direct of McElhenney, the assistant D.A. solicited perjury and misrepresentation of fact from McElhenney that the time was short between Lynch's "No" to the question of sexual assault and Lynch's response to "do you have anything else to add", whereupon Lynch goes into what is clearly consensual sexual details. Intervening between these two questions, was McElhenney's personally incriminating remark that during the interview he "found out a rape had occurred" and the usual terminal question to a police victim interview did Lynch want to press charges for the assault.

Lynch had been neutralized as a witness for Rushing by the August D.A.'s investigation of her perjury, which produced her ambiguous affidavit, where, she admits she was "feeling a little guilty" for Rushing, which admission this Court should be compelled to conclude is guilt of her false testimony as to no consent sex. Though throughout here the "perjury" is attributed to Lynch alone, as we glimpse through the record, the ugly specter raises its head that Detectives McElhenney and Johnson suborned any false swearing by Lynch at the trial. This is first seen in McElhenney's admission that he "found out a rape had occurred"(CP30, RE55). It is confirmed in Lynch's deposition testimony that the Detectives wanted to make the sex a rape case.

Contradictory Accounts of Severity of Injuries

The medical reports, not even mentioned at trial, when compared with Lynch's trial testimony, prove how Lynch lied about the head injuries and that she was passing in and out of consciousness all the next day, told the nurses upon the return for the rape kit session she had

told the police Rushing had tried anal sex but then desisted when she complained, and wanted everyone to know Rushing was the father of her child. Because the Judge admitted at the reconsideration that he had taken the time(H128) to examine the photograph exhibits from the jury trial (H128) then Rushing here makes a few remarks about the weight of those photographs. The photographs show a horizontal bruising across the upper portion of the buttocks to their joinder with the lower back. Of course, there are bruises on back of both the forearm and upper arm of her left arm, maybe warding off head blows. Any bruises must, in all fairness, be re-examined in light of Lynch deposition testimony that merely resting on her elbows on a table caused her to bruise. Nurse Strickland's testimony as to the bruises does not support Lynch's trial testimony of the assault. Neither did the Catscan.(CP42, RE67) Lynch testified at trial (T83):

> " had knots in my head, and **this arm** here was swollen and bruised up. My hand was swollen. my finger was broken on **this hand** and this hand was bruised and swollen, too. And all my entire backside was bruised up, and I had bruises in my side, bruises around my neck. And I was, just a lot of bruises that I had on me."

E.R. Nurse Strickland (T142-143(RE271) only saw bruises on her buttocks and her arms, one on her right side of her neck, center way of her neck which was a mark or a bruise, but not an abrasion. In the medical reports(CP32, RE57) Nurse Williamson, RN at 5:55 p.m. wrote "...with complaints of pain to the left arm, left thigh, ***left side of head***, complete buttocks, right hand, right neck." The medical report has only one entry on head injury: "small scalp contusion left parietal area".(CP37, RE62)

Notably, though Lynch testified to all the pain so much that Judge Bailey at H 129 exclaimed that Lynch was beaten so badly she could not even sit down, Dr. Reinshagen at the first E.R. visit where no rape was mentioned, only told Lynch to take Advil. Only when she returns about 11:15 p.m., after McElhenney (CP30, RE55)"found out there was a rape", does Lynch fabricate

enough pain for the Motrin. Was her pain increasing or her fabrication of rape demanding pain medicine to corroborate false pain? Officer B. T. Prichard's report(CP26 RE51) reflects Lynch told him she had been beaten in the head several times. Lynch fabricates head injuries to corroborate the intermittent and persistent "passing out" to deceive the jury away from the obvious conclusion from her words to McElhenney and at trial that she consented to the sex.

Factual Distortions by District Attorney Witnesses.

At the state postconviction hearing, in an intentional "credibility" ruse, the D.A. represented that Lynch hadn't been brought in and just signed the affidavit right there. But he and his staff, creating an impression of free will, tried to persuade the judge that Lynch took a paper tablet home and drew up her own statement. Now through the reconsideration affidavits, Lynch has torpedoed that contrivance. She adamantly told Holt she went only once to the D. A.'s office.

While we are on the subject of misrepresentations and contrivances, the effect of these on the trial judge was substantial. An example is the crying. First, the Judge never mentioned anything about Lynch crying. Faced with the crying in his office, Mr. Mitchell attempted to thwart the natural inference that Lynch cried because she had committed perjury at trial, by misrepresenting she had cried at trial. Victim advocate Shirley Adams gave two reasons why Lynch cried: "(S)he was upset, I guess, about the calls that she had been getting and all the other stuff that had been going on with her, I guess, with her son and different things like that."(H112) Criminal investigator Louis Robbins, admitted he didn't know why she was crying, while allowing she was crying because she had given her recanting sworn statements and the deposition. Strange is that the trial judge does not elaborate or mention Robbins' testimony and the question must be asked was this because Robbins says she was very upset, crying during the whole interview. In fact, Adams says Lynch wanted to go home and make out the statement

because she was very upset, but the Judge disregarded this "crying" and at CP 215, RE110 wrote: "Ms Adams stated that Ms Lynch requested that she be allowed to go home and write out her own statement, which she did." Given the judge says that Adams said Lynch was upset from calls from Rushing's friends, but it was not Adams(H112), but Robbins and he said(H96): "tired of receiving anonymous phone calls and messages from his friends". Another conflict between Robbins and Adams and a reason for the Judge to not refer to Robbins is in actually what Lynch was asked and agreed to do. Adams said (H107)actually first they "asked her to make a–to write out a statement, basically, saying what she had told us when we were talking to her in your office," however, Mr. Mitchell immediately corrected Adams: "Did we not actually ask her to give us a statement of what had actually happened?" Robbins, on the other hand at H97 described it differently: "We asked her would she give a statement. In fact, you asked her would she give a statement to the effect of which one was the truth as far as the deposition and the trial testimony." Judge Bailey(CP 214-215,RE9-10) said that "She(Adams) testified that they only asked her what was the truth. ...Ms Adams stated that Ms Lynch requested she be allowed to go home and write out her own statement, which she did." Robbins' testimony, it is respectfully submitted, was intentionally disregarded by the Judge because it was substantially and materially contradictory to Adams' and revealed how pressured Lynch was at the D.A.'s office. There is no doubt the interrogation was so intimidating it generated the final August Affidavit. The above machinations of the truth surrounding the D. A.'s session with Lynch surely explain why the trial judge himself was convinced that Lynch was not credible, but the judge likewise should have been convinced the August 2001 Affidavit was coerced.

Mr. Mitchell, fearful of Lynch's testimony because he had coerced the August Affidavit, and, without Lynch to contradict him, did a yeoman's job in groundlessly amplifying and distorting Lynch's August 20, affidavit. The examples are numerous: (1)Mitchell asking Rushing on cross at H30 was he even aware "***your friends had been***

calling her and putting pressure on her to lie about this?"; (2) asking Rushing at H33, and, misrepresenting it is respectfully submitted, "did you know she came into my office and said she had received so much pressure from your friends that she felt like it was something she had to do"; (3)asking Rushing at H34, " ***Do you know*** how many of your friends have influenced her?"; (4)asking at H35, "How many of your friends or family members or colleagues have pressured her to change her testimony that she gave at trial?" and (5)(H36) had pressured Lynch into "thinking that a rape was something other than what everybody knows it is"; (6)at H 38, asking Rushing did Lynch ask him to get his friends to quit bothering her and whether she was ever offered anything to change her testimony; and (7)questioning at H39-40 whether Lynch in her February 1998 affidavit was trying to recant "that you beat her".

Mr. Fortenberry, the Assistant D. A. who tried the original indictment, without any tears from Lynch at trial for his final argument, was left only with the elusive word "fear", to dispel the jury's concern that Rushing made no threats, used no force, and consistently yielded to Lynch's denial of sex and yielded to her discomfort from the attempted anal sex.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF WHETHER A CERTIFICATE OF APPEALABILITY SHOULD ISSUE ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN A CASE MAKING A GOOD SHOWING OF INSUFFICIENT EVIDENCE AND ACTUAL INNOCENCE AT THE JURY TRIAL AND SUCH INNOCENCE AT THE STATE POSTCONVICTION RELIEF HEARING ON RECANTATION IF COUNSEL HAD PRESENTED AT TRIAL ALL THE EVIDENCE AVAILABLE.

The Fifth Circuit Panel's denial of a Certificate of Appealability should be reversed for the following reason:

The Fifth Circuit Panel had sufficient compelling evidence omitted at trial that was the fault of trial counsel that showed actual innocence of forcible/no consent rape thus requiring issuance of a Certificate on ineffective assistance of counsel and insufficient evidence to convict. Thus the district court was in error in dismissing the habeas petition.

In General

The COA should be granted if Rushing makes "a substantial showing of the denial of a constitutional right" by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

The COA question "is a threshold inquiry only, and does not require full consideration of the factual and legal bases of [the petitioner's] claim." Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The Magistrate in his Report and Recommendation (DCR pp. 151-181) set forth the standard for habeas relief, as next stated, but misapplied it. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-32, 110 Stat. 12144, in Title I modified 28 U.S.C. § 2254 and set the following standard:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, where the state court adjudicated the petitioner's claim on the merits, this Court reviews questions of fact under § 2254(d)(2). Rushing contends here that, when the PCCR proceedings, testimony and exhibits are fairly considered, it is obvious that the State courts were unreasonable in determining the facts from the evidence that was presented. The facts at the PCCR have been critiqued, along with the Exhibits *supra*.

Questions of law or mixed questions of law and fact are reviewed under §2254(d)(1). A state court decision is "contrary to" federal law if it is dependent upon principles of law which directly conflict with prior Supreme Court holdings, or reaches a different conclusion than that reached by the Supreme Court on materially indistinguishable facts.

An "unreasonable application" by a state court decision is where the court "correctly identifies the governing legal principle" but then "unreasonably applies it to the facts of the particular case." Bell v. Cone, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Rushing contends that this is the case of the ineffective assistance claims. There can be only little doubt that had the evidence presented through the habeas been presented and the cross examination been pursued a different trial result would have been obtained. Rushing contends that the State court's conclusions are "objectively unreasonable" and habeas relief is justified, therefore a COA should have been granted. Rompilla v. Beard, 545 U.S. 374, 380,125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005).

Rushing contends he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); Slack, *supra*, 529 U.S. at 483, 120 S.Ct. 1595.

Rushing has demonstrated that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El, *supra*, 537 U.S. at 336, 123 S.Ct. 1029 (quoting Slack, 529 U.S. at 484,

120 S.Ct. 1595). The "factual review" generated disagreement in the Mississippi Court of Appeals. State PCCR Judge Bailey himself said he did not know what Lynch would say at the hearing. In part this could just as well have been because of her statement to Detective McElhenney that no sexual assault occurred. This could be because she said that she was not "restrained" at the trailer. Objectively the evidence of the comings and goings of her son and the utility man at the trailer, support this statement by her. There is no substantial doubt that the sex was consensual and purposeful by Lynch to restore the beneficence of Rushing.

The methodology of determination of the request for a COA "requires an overview of the claims in the habeas petition and a general assessment of their merit." *Id.* In Williams v. Taylor, 529 U.S. 362,389, 120 S.Ct. 1495,1511, 146 L.Ed.2d 389(2000) Justice Stevens analyzed the AEDPA and said:

> In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody-or, as in this case, his sentence of death-violates the Constitution, that independent judgment should prevail

Justice O'Connor, *ID.* 411, 120 S.Ct. at 1522, in Part II of her opinion, joined by Chief Justice Rehnquist, Justices Kennedy, Thomas and Scalia, , after confirming that though Congress did not define "unreasonable" as it modified application, all members of the "legal world" knew what reasonable was and she wrote:

> Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its

> independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Here, the facts before the district court and the state courts surely support a conclusion of "unreasonable".

The *AEDPA* requires that factual findings are presumed to be correct and thus Rushing has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. 2254(e)(1). Rushing contends that he has done such. There is no basis to conclude that the trial counsel made a "strategy choice" not to reveal and use all the evidence that Rushing has now put before the Mississippi Courts and the District Court. The rebuttal of "correctness" is achieved by the degree of "unreasonableness" when all the facts are incorporated into a determination of the conclusion.

Insufficiency of the Evidence to Prove Rape.

The pertinent law on this issue is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Upon the appeal of the original conviction, the Mississippi Court of Appeals was clearly erroneously that the state law of Stewart v. State, 466 So.2d 906 (Miss.1985) should apply, it being quoted as follows:

> The well-settled rule is that in a prosecution for rape, physical force on the part of the assailant or physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of great bodily harm.

Rushing adopts the analysis and conclusion of the two dissenting state appellate Judges in the Opinion rendered by the Mississippi Court of Appeals and shows how true

their conclusion was. The affidavits, missing Detective McElhenney's investigation statement from Lynch, missing ER records and Lynch's recanting Affidavits and deposition and the D. A.'s affidavit all now show innocence. The findings and conclusion of the State PCCR judge have been meticulously dissected and critiqued in light of the testimony of the D.A.'s witnesses surrounding what occurred during the D. A.'s getting the Affidavit from Lynch.

The medical reports and PCCR proof dispel any support for "drifting in and out of consciousness" and denude of any force the following quote from the State court opinion that the most important evidence of yielding to threat of force was:

> ... she (1) denied having engaged in consensual intercourse, (2) stated that Rushing had, "beat me half senseless", and (3) stated her belief that Rushing would not leave her alone or leave her, until he had intercourse with her.

As the two Mississippi Court of Appeals Judges pointed out, Lynch and Rushing were making up for Lynch's failure to pay the bills and Rushing's assaulting her for that.

The Honorable Magistrate Judge was wrong, it is most respectfully submitted, when he concluded at page 16 of the Report and Recommendation(Appendix, pp. 27-28) that the issue was just a credibility one, such conclusion totally in disparity with the evidence clearly presented at the state PCCR hearing and the Exhibits thereto.

Ineffective Assistance of Counsel.

The Honorable Magistrate Judge, it is respectfully submitted, has erroneously concluded as to the magnitude and gravity of the counsel's errors that went to substantial proof or defense of the elements of the crime charged.

Rushing argues that the "totality of the circumstances" shows he did not have effective counsel and the omissions and errors were not strategic choices. Such actions contended below that counsel should have taken all point to the correct strategy in mounting a defense to the Indictment.

As the Magistrate pointed out the Mississippi Supreme Court rejected the ineffective counsel claims just saying they were without merit and saying that court surely applied the standard set forth in Strickland v. Washington, Strickland v. Washington, 466 U.S. 668,104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the "clearly established" law for claims of ineffective assistance of counsel. Under Strickland, both a deficiency and prejudice prong must be satisfied, which when met proves the adversarial process was so lacking that it rendered an unreliable result, thereby denying a petitioner a fair trial. See *Id.* at 687. There is a presumption of "reasonable professional assistance" , which requires Rushing to show his defense was so prejudiced that there is a reasonable probability that without those errors Rushing would not have been convicted. See *Id* at 689-694 (holding a "reasonable probability is a probability sufficient to undermine confidence in the outcome").

It defies "reason" that the failures of counsel on presenting evidence of innocence, first by contradictory solemn statements by Lynch and independent basis in fact for consensual sex to renew favor with Rushing for material benefits of a home and expenses were reasonable trial strategy.

Rushing respectfully submits he has shown that counsel was not prepared and that his actions were not the result of a reasonable trial strategy. See *Id.* at 689 He contends the detailed outline above of the Insufficiency of the Evidence shows clearly trial counsel was not "objectively competent".

The Strickland test "of necessity requires a case-by-case examination of the evidence," Wright v. West, 505 U.S. 277, 287, 308, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)(KENNEDY, J., concurring in judgment). The district court did not fully consider the detail and weight of the evidence in light of the "totality of the circumstances" of the trial.

The failures of counsel listed by Rushing all would have led to a verdict of "not guilty". Those counsel failures are that he : failed to obtain and use police reports, rape kit, emergency room records as well as a statement by the

victim in which she indicated the sex was consensual; did not issue subpoenas or view photographs until the day before trial; failed to develop sexual history between petitioner and victim; and failed to introduce information regarding the paternity of victim's child. The Magistrate spends time on the "rape kit", but better to have spent time on the total E. R. Reports and Detective McElhenney's interview, for they show minimum unconsciousness, and no force or restraint at the trailer and critically, Lynch saying there was no sexual assault. Additionally, the E. R. report does not show, contrary to the Mississippi Supreme Court's opinion on direct review that Lynch was "stomped and chocked". There was only a red mark on side of her neck, not bruise, but red mark and bruises on her buttocks and forearms, surely from the pool cue. The physical conflict was exaggerated and purposefully so and trial counsel failed to contradict Lynch through her own solemn words at the E. R. and more pointedly her statement to the Detective.

The Magistrate Judge cites the presumption strategy choice where the record is silent as stated in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Such presumption is rebutted here.

Without a severance of the aggravated assault count from the forcible rape count, trial counsel knew the club assault would be used to show some force on Rushing's part as a basis for the rape. Lynch's testimony of severity of that assault should have been revealed as exaggerated through use of the ER reports and her statements therein. She was not beaten severely about the head. Detective McElhenney's report where Lynch distinguished that she was only restrained at the Club and not at the trailer is of great weight, nearly determinative, that the Club assault did not bleed over into the bedroom several hours later. "Not retrained" means free. Free to talk with her son, free to leave with him, free to leave with the utility worker.

Likewise, in supporting consensual sex, trial counsel should have clearly proven the relationship, the question of the paternity of the child and the benefits flowing to Lynch of a free furnished home had she been successful in mending the relationship through a *quid pro quo* of sex.

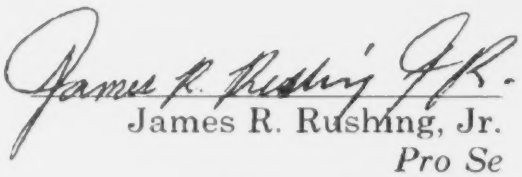
Calling the ER doctor and the utility worker would have shown the conniving nature of the purported rape.

Though the Magistrate cites a rule that uncalled witness complaints are not favored in habeas corpus because their testimony is largely speculative, per McCoy v. Cabana, 794 F.2d 177, 183 (5th Cir.1986), the ER doctor and the nurses were credentialed professionals and the utility worker would have described Lynch's demeanor and deportment.

The McElhenney report, the lack of "restraint" and Lynch's admission at the hospital, when initially asked about a possible sexual assault, and answering in the negative, all support a conclusion that counsel's failures were not "strategy" but had they not occurred, Rushing would never have been convicted.

CONCLUSION

Petitioner Rushing urges the Court to reverse the denial of a Certificate of Appealability on the claims identified and remand for allowance of the appeal before the Fifth Circuit Court of Appeals.



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Supreme Court, U.S.
FILED
09-140 JUL 28 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

Number

In The
SUPREME COURT OF THE UNITED STATES

JAMES R. RUSHING, JR.
PETITIONER

Versus

LAWRENCE KELLY, Superintendent, and JIM HOOD, Attorney General of Mississippi

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

to

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I. Order of Fifth Circuit with reasons

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 08-60314
USDC No. 3:05-CV-101

JAMES R RUSHING, JR,

Petitioner -Appellant

v.

SUPERINTENDENT LAWRENCE KELLY,

Respondent -Appellee

Appeal from the United States District Court
for the Southern District of Mississippi at Jackson
(Filed: U. S. Court of Appeals
Mar 16 2009
Charles L. Fulbruge, III Clerk)

O R D E R:

James R. Rushing, Jr., Mississippi prisoner # 04851, filed a 28 U.S.C. § 2254 petition challenging his 1997 conviction and 10-year sentence for rape. The district court considered the merits of each of Rushing's claims and dismissed the petition with prejudice.

Represented by counsel, Rushing contends that there was insufficient evidence to support his conviction because, under the correct view of evidence, the sexual encounter at issue was consensual. He also contends that trial counsel was ineffective for failing to do the following: (1) introduce emergency room reports and the victim's prior statements to show that her testimony regarding the severity of the assault that preceded the rape was exaggerated; (2) introduce a detective's report wherein the victim clarified that she was not restrained at the time of the rape; (3) move to sever the rape charge from an aggravated assault charge, which resulted in a conviction but was later overturned, because the testimony regarding the assault could "be used to show some force on Rushing's

part as a basis for the rape;" (4) prove the relationship between Rushing and the victim, "the question of the paternity of the child" that the couple had together, the fact that Rushing owned the trailer in which the victim resided, and that it would thus have been to the victim's benefit to placate Rushing with consensual sex; and (5) call the emergency room doctor and a utility worker who went to the trailer on the morning of the rape to testify regarding "the conniving nature of the purported rape."

With respect to the constitutional claims that Rushing has raised in his motion seeking a certificate of appealability (COA), Rushing has not shown that reasonable jurists would find the district court's assessment of those claims to be debatable. *See Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003); *Slack v. McDaniel,* 529 U.S. 473, 484(2000). Accordingly, his motion for a COA to appeal the district court's dismissal of those claims is denied. Al of the other claims raised in the district court, including additional assertions of ineffective assistance of counsel, that were not raised in Rushing's COA motion before this court have been abandoned. *See Hughes v. Johnson,* 191 F.3d 607, 613(5th cir. 1999).

COA DENIED.

s/Fortunato P. Benavides
United States Circuit Judge

II. Order of Fifth Circuit Panel Denying Reconsideration

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 08-60314
USDC No. 3:05-CV-101

JAMES R RUSHING, JR,

Petitioner -Appellant

v.

SUPERINTENDENT LAWRENCE KELLY,

Respondent -Appellee

Appeal from the United States District Court
for the Southern District of Mississippi at Jackson

Before JOLLY, BENAVIDES, and HAYNES, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration IT IS ORDERED that the motion is *Denied.*

(Filed: U. S. Court of Appeals
Apr 29, 2009
Charles L. Fulbruge, III Clerk)

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitution of the United States of America

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. Anti-terrorism and Effective Death Penalty Act

28 U.S.C.A. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless—(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or ...

28 U. S. C. 2253(c)(1)

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U. S. C. 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—
(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

C. Mississippi Statutes

§ 97-3-65. Rape; carnal knowledge of child under fourteen years of age.(Amended **Mississippi Laws** 1998, Ch. 549, § 2, eff. July 1, 1998)

(2) Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person's consent, by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

IV. Other Materials

A. Judgment of District Court Adopting Magistrate Report and Recommendation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JAMES R. RUSHING, #04851

PETITIONER

VS.
CIVIL ACTION 3:05cv101 TSL-JCS

LAWRENCE KELLY AND JIM HOOD

RESPONDENTS

JUDGMENT

This matter having come on to be heard on this date upon the report and recommendation of United States Magistrate Judge James C. Sumner entered in this cause on February 8, 2008, and the court, having adopted said report and recommendation as the finding of this court by order dated this day, finds that this cause should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the above captioned cause be, and the same is hereby, dismissed with prejudice.

SO ORDERED this the 14th day of March, 2008.

/s/Tom S. Lee
UNITED STATES DISTRICT JUDGE

(Filed: U. S. District Court
S. D. Mississippi
Mar 14, 2008
J. T. Noblin, Clerk)

B. Magistrate Judge Report and Recommendation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JAMES R. RUSHING, #04851

PETITIONER

VS. CIVIL ACTION NO. 3:O5CV1OITSL-JCS

LAWRENCE KELLY AND JIM HOOD

RESPONDENTS

(Filed: U. S. District Court
S. D. Mississippi,
Feb. 8, 2008
J. T. Noblin, Clerk)

REPORT AND RECOMMENDATION

This cause is before the undersigned on the petition of James R. Rushing for habeas corpus relief pursuant to 28 U.S.C. §2254. Having considered Rushing's petition, the State's answer thereto and the state court record, the undersigned concludes, for the reasons which follow, that the petition is not well taken and should be denied.

I. PROCEDURAL HISTORY

James R. Rushing, Jr., was convicted by a jury of aggravated assault and rape on September 11, 1997, in the Circuit Court of Lauderdale County, Mississippi. He was sentenced to twenty years on the aggravated assault conviction and ten years on the rape conviction. to run concurrently.

Rushing appealed his conviction and sentence through counsel to the Mississippi Supreme Court, assigning as error the following:

A. Whether a jury instruction on aggravated assault with a "deadly weapon" without the element of "serious bodily injury" is a variance from an indictment that does not have "deadly weapon" as an element but only has "serious bodily injury" and the defendant is denied

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proper constitutional notice of the charges, a fair trial, the right to confrontation and due process of law.

B. Whether jury instructions on aggravated assault are "plain error" as a judicial comment on the evidence by containing the phrases "when used as a weapon under the existing circumstances" and the phrase "a deadly weapon, specifically a broken pool stick" and thus the defendant is denied a fair trial, confrontation of witnesses and due process of law.

C. Whether the jury instructions under facts which showed hilling with a broken pool stick, pointing a gun and kicking with a foot are fatally confusing and abstract when the only specific reference to "deadly weapon"in the instructions points to the pool stick and thus the defendant is denied a fair trial and due process of law and trial by jury.

D. Whether the evidence of forcible rape is sufficient to support a verdict of guilty when there was no contemporaneous force and the victim had many opportunities to seek aid, assistance and flee from the presence of the defendant with whom she had a long term beneficial sexual liaison and she traveled with him back to her trailer and nearly twelve hours after the coupling first told the

interrogating officer she had not been sexually assaulted.

E. Whether the defendant was denied his right to confrontation of witnesses and a fair trial when moments before the victim's son was to testify, the state first disclosed to the defendant that the son would testify to defendant's admission of assaulting the mother and testify that the defendant had made three valuable offers to the mother if she would drop the charges.

F. Whether the defendant was denied his right to confrontation of witnesses and a fair trial when the court refused admissibility of the victim's contradictory statement to the interrogating officer that she had not been sexually assaulted.

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G. Whether the evidence was sufficient to support a verdict of aggravated assault, when the victim only had bruises, redness on the throat from alleged choking and a broken finger and gave a contradictory and exaggerated account of the incident with the defendant at the bar and much later engaged in voluntary sex with him after rejecting an opportunity to return to her trailer alone without defendant.

On February 8, 2000, on Rushing's motion for rehearing, the Mississippi Court of Appeals, to whom the case had been assigned by the Mississippi Supreme Court, affirmed Rushing's rape conviction and sentence, but reversed and remanded the aggravated assault conviction. **Fn1** Rushing v. State, 753 So. 2d 1136 (Miss. App. 2000).

Thereafter, Rushing filed, again through counsel, a "Appellant's Motion for Post-Conviction Relief and Bail." In this pleading before the Mississippi Supreme Court, he urged the following grounds:

A. Facts exclude rape.

B. Material evidence some of which is newly discovered and some of was not offered in the original trial, and which would have resulted in acquittal of the rape charge.

C. Ineffective assistance of counsel:

(1) failure to make certain essential pretrial motions such as requirements to prove inconsistent statements by the prosecutrix;

(2) failure to make a Motion for Severance;

(3) failure to make a Pre-trial Motion to strike a defamatory alias injected by prosecution;

(**Fn 1** Rushing has not been reprosecuted for the assault charge.)

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(4) failure to make a Motion to restrict prosecutors from using alias in voir dire, opening statements, examination of witnesses, and closing statements;

(5) failure to adequately prepare for trial in a reasonable manner including failure to notify the appellant timely and to investigate the facts and prepare trial subpoenas for essential

documentary evidence and material witnesses to testify;

(6) failure to adequately cross-examine the prosecutrix;

(7) failure to adequately present and argue a Motion for Directed Verdict on the rape;

(8) failure to offer any rebuttal evidence, police records, testimony of medical doctor who conducted rape test;

(9) failure to carry out any pretrial discovery;

(10) failure to furnish proper and essential jury instructions defining the rape statute and the burden of the state to prove forcible rape.

D. Prejudicial and unfair tactics by prosecution consisting of a two count indictment, adding the rape charge to give force to the assault charge and changing the name in the indictment by adding the Appellant s a/k/a "devil catcher" so as to connote that Rushing was a professional criminal and to unduly prejudice the jury, and unfairly referring to him by this name in Voir Dire through closing arguments.

On August 8, 2001, the Mississippi Supreme Court granted Rushing's application to file a postconviction motion on the issue of the victim's recanted testimony. After an evidentiary hearing,

on October 12, 2001, the circuit court denied Rushing's motion for relief, from which Rushing appealed, raising the following issues:

A. Whether a defendant is denied due process of law and fundamental fairness when the hear ing judge finds that had the recanting witness testified there was no way to know what she would say, whether to support her trial testimony or recant it, and denies a new trial by finding that recanting deposition was the result of pressure,where the ultimate finding of truth at trial is clearly erroneous and not supported by substantial evidence and a new trial should be ordered.

B. Whether the standard of review is one of de novo rather than deference when the hearing judge reflects in his opinion and ruling that the recanting witness cannot be relied upon to tell the truth, but faults the prisoner for notc alling her as his witness where the district attorney has obtained her affidavit reaffirm ing her trial testimony and that such belief in the final district attorney s affidavit reflects that the hearing judge has accepted the belief that the district attorney s affidavit is the truth without sufficient evidence and a new trial should be ordered.

C. Whether a defendant is denied due process of law, the right to confrontation and fundamen tal fairness when a recanting victim s hearsay statements to the district attorney are allowed into evidence resulting in a finding that the recanting deposition and affidavits were the result of pressure, when the recanting victim has become the district attorney s witness in an affidavit on the eve of the post-conviction relief hearing where she reaffirms her trial testimony but the district attorney does not call her to the stand.

D. Whether the trial judge abused his discretion upon a hearing of the prisoner's motion for

reconsideration which attached affidavits which materially contradicted the state's evidence at the evidentiary hearing by refusing to consider the affidavits and refusing to reconsider the denial of post-conviction relief and thus defendant is denied due process of law, the right to confrontation and

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fundamental fairness.

On September 23, 2003, the Mississippi Court of Appeals affirmed the circuit court's denial of Rushing's motion for post-conviction relief. ~ Rushing v. State, 873 So. 2d 116 (Miss. App.2003), reh'g denied, January 20, 2004; cert. denied, May 20, 2004.

On February 14, 2005, Rushing filed his petition for writ of habeas corpus in this court, raising the following grounds:

> Ground A - Ineffective Assistance of Counsel under the Sixth Amendment to the United States Constitution:
>
> > (1) Trial counsel failed to adequately prepare for trial in that he did not obtain and use police reports, rape kit, emergency room records as well as statements by the victim in which she indicated the sex was consensual; did not issue subpoenas or view photographs until the day before trial; failed to develop sexual history between petitioner and victim; and failed to introduce information regarding the paternity of victim's child.
> >
> > (2) Trial counsel failed to file motion requesting severance of Counts one and two.
> >
> > (3) Trial counsel failed to call Tommy Johnson, the utility worker who interrupted the alleged rape and failed to call the doctor

who performed the rape kit.

(4) Trial counsel failed to thoroughly cross-examine the victim regarding the utility worker, her inconsistent statements and whether she was forced to have sex with petitioner.

(5) Trial counsel failed to attack victim's veracity by questioning victim and other witnesses.

(6) Trial counsel should have objected when the prosecution used Rushing's alias, "Devil Catcher," numerous times throughout the trial.

Ground B - Petitioner was denied due process of law under the 14th Amendment because the "forcible and no consent" element of rape was not proven beyond a reasonable doubt.

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Ground C- Petitioner was denied a fair trial by jury since the prosecution used unfair, irrelevant tactics and dominated Ms. Lynch and thus petition er was denied a fair trial by a fair jury and due process of law under the 14th Amendment to the United States Constitution.

Ground D - The jury was not properly instructed and if all the witnesses and contradictions had been presented at trial petitioner would not have been convicted, since he is actually innocent and thus he is being denied "fundamental fairness" and due process of law under the 14th Amendment to the United States Constitution.

Ground E - Petitioner was denied a fair trial by a fair jury because the testimony of the alleged victim Marilyn Lynch is now shown through her post trial affidavit as inadequate to constitute forcible rape and Ms. Lynch has now stated under oath facts to support the conclusion that there was no force surrounding the sex, but the sexual acts were by consent and thus petitioner has been denied his rights to due process under the 14th Amendment to the United States Constitution.

Ground F - Whether a jury instruction on aggravated assault with a "deadly weapon" without the element of "serious bodily injury" is a variance from an indictment that does not have "deadly weapon" as an element but only has "serious bodily injury" and the defendant is denied proper constitutional notice of the charges, a fair trial, the right to confrontation and due process of law.

Ground G. Whether jury instructions on aggravated assault are "plain error" as a judicial comment on the evidence by containing the phrases "when used as a weapon under the existing circumstances" and the phrase "a deadly weapon, specifically a broken pool stick" and thus the defendant is denied a fair trial, confrontation of witnesses and due process of law.

Ground H. Whether the jury instructions under facts which showed hitting with a broken pool stick, pointing a gun and kicking with a foot are fatally confusing and abstract when the only specific reference to "deadly weapon" in the instructions points to the pool stick and thus the defendant is denied a fair trial and due process of law and trial by jury.

Ground I - Whether the evidence of forcible rape is sufficient to support a verdict of guilty when there was no contemporaneous force and the victim had many opportunities to seek aid, assistance and flee from the presence of the defendant with whom she had a long term beneficial sexual liaison and she traveled with him back to her trailer and nearly twelve hours after the coupling first told the interrogating officer she had not been sexually assaulted.

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Ground J - Whether the defendant was denied his right to confrontation of witnesses and a fair trial when moments before the victim s son was to testify, the state first disclosed to the defendant that the son would testify to defendant's admission of assaulting the mother and testify that the defendant had made three valuable offers to the mother if she would drop the charges.

Ground K - Whether the defendant was denied his right to confrontation of witnesses and a fair trial when the court refused admissibility of the victim s contradictory statement to the interrogating officer that she had not been sexually assaulted.

Ground L - Whether the evidence was sufficient to support a verdict of aggravated assault, when the victim only had bruises, redness on the throat from alleged choking and a broken finger and gave a contradictory and exaggerated account of the incident with the defendant at the bar and much later engaged in voluntary sex with him after rejecting an opportunity to return to her trailer alone without defendant.

Ground M -There was no proof beyond a reasonable doubt of the elements of forcible rape and due process was denied with the state failing to meet its burden of proof. Both convictions should have been reversed because the joint trial, without severance of the count for aggravated assault, so infected a fair jury trial on the rape count, that due process was denied. The forcible rape and an instruction on "feloniously" should have been granted when requested by the jury.

Ground N - The prosecution used unfair tactics denying a fair trial by the two count indictment, knowing the proof was not there on the rape count and by inflaming the jury with the Petitioner's citizens band "handle" of "Devil Catcher" in the indictment and constantly referring to him by that name at trial. The State dominated the alleged victim Marilyn Lynch on the sex testimony contrary to the facts.

Ground O - Material evidence was not presented that would have resulted in an acquittal and some of this is newly discovered evidence.

Ground P - The trial counsel was ineffective by failing to adequately prepare for trial, advise Petitioner of the trial date weeks before and not just a few days before and failure to ask for a continuance because of a pending DNA paternity test that would have revealed Ms. Lynch falsely accused Petitioner of being the father. Trial counsel failed to obtain the E.R. records on Ms. Lynch's visit to Riley Hospital, which reveal no rape and contradict the charge of rape. Trial counsel was ineffective by failing to adequately cross-examine adverse witnesses especially and to call material

witnesses and cross-examine Ms. Lynch on prior material substantial conflicting statement of "no rape" and other statements and testimonial conduct. In particular, counsel should have pointed out that Lynch told Detective McElhenny that she was not restrained at the trailer, only at the Club. Counsel failed to seek a severance and adequately to argue his Motion for Directed Verdict. Improper and unfair jury instructions were not opposed and counsel did not present adequate instructions on the forcible rape. Also, the prosecution used peremptory jury challenges to exclude Blacks, the final jury being 10 whites and 2 Blacks, but trial counsel made no objection and no argument against violation of Batson.

Ground Q. Ms. Lynch changed and elaborated upon her testimony in affidavits and a deposition where she was represented by counsel which confirms no rape took place, but the sex was consensual and thus due process and a fair trial were denied. The rape accusation was manufactured by the Meridian Police Department as unfair leverage to exact a guilty plea from Petitioner on the aggravated assault count. The two count indictment was an unfair tactic and a severance should have been requested and granted.

Ground R - If there had been a fair trial, without prejudicial linking of the aggravated assault and all the evidence heard, and the jury properly instructed, there would have been an acquittal of James Rushing of forcible rape. Rushing is actually innocent of the rape count.

As the State correctly points out, the fifteen grounds set out by petitioner are repetitive, and thus, for ease of analysis will be regrouped into eight issues/grounds, as suggested by the State: (1) sufficiency of the evidence (Grounds B, I, L and M); (2) ineffective assistance of counsel (Grounds A and P); (3) prosecutorial misconduct

(Grounds C, N and Q); (4) improper jury instructions (Grounds D, F, G, H and M); (5) actual innocence/new evidence (Grounds E, H, O, Q and R); (6) improper admission of evidence (Ground J); (7) improper exclusion of evidence (Ground K); and (8) severance (Grounds M and Q). In response to the petition, the State argues that the applicable portions of the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"], Pub. L. 104-132, 110 Stat. 12144, prevent this court from granting relief based upon Rushing s petition.

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II STANDARD OF REVIEW

The instant case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), contained in 28 U.S.C. 2254(d) (2002). The applicable provision provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or *involved an unreasonable application of clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added).

Under AEDPA, where the state court adjudicated the petitioner s claim on the merits, this court reviews questions of fact under § 2254(d)(2), while questions of law

or mixed questions of law and fact are reviewed under § 2254(d)(1). Factual findings are presumed to be correct, and the court defers to the state court s decision regarding factual determinations unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Hill v. Johnson, 210 F.3d 481, 485 (5th Cir. 2000)§ 2254(d)(2). The court independently reviews questions of law and mixed questions of law and fact to determine whether the state court s decision thereon was either "contrary to" or an "unreasonable application of federal law. Williams v. Taylor, 529 U.S. 362,403-408 (2000); Hill, 210 F.3d at 485.

The first step in this inquiry is to determine what federal law should be applied to the

state court's decision. Williams, 529 U.S. at 404. The determinations of the state courts must be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." Id.; § 2254(d)(1). Next, this court must determine whether the state court's decision was "contrary to" that established Federal law. The proper standard is an objective one, not subjective. at 408-409. The term "unreasonable" was distinguished from "erroneous" or "incorrect"; thus, a state court's incorrect application of the law may be permitted to stand if it was, nonetheless, "reasonable."

A summary of the AEDPA law is that ultimately, "[to prevail on a petition for writ of habeas corpus, a petitioner must demonstrate that the state court proceeding 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Robertson v. Cockrell, 325 F.3d 243, 247-48 (5th Cir. 2003) (en banc) (quoting 28 U.S.C. § 2254(1)U) (2000)). The courts have no authority to grant habeas corpus relief simply because "we conclude, in our independent judgment, that a state supreme court s application of [federal] law is erroneous or incorrect." Catalan v. Cockrell, 315 F.3d 491, 493 (5th Cir. 2002) (citation and quotation omitted).

III. FACTS

On February 3, 1997, shortly after mid-night, Rushing called M.L., his mistress of five years with whom he had a young child, to let her know that he was on his way to pick her up. M.L. told him that she was on the phone with her aunt and with her sister. Rushing then accused M.L. of lying because he was on his other line with M.L.'s sister. Upon arriving at M.L' s trailer, which Rushing had provided to her and their young child, he noticed that several of the

appliances were missing. Rushing asked M.L. whether she had used the money he had given her to pay the rental company. M.L. insisted that she did, but that the rental company had, nonetheless, repossessed the items.

M.L. testified that as she and Rushing, whose alias was "Devil Catcher," headed to his night club, he was angry about the appliances and telephoned a friend, whom she presumed to be Eddie Cole. While he was on the phone, Rushing remarked that he had "this bitch in the car and was trying to find somewhere to kill her." Upon arrival at the empty club, Rushing told M.L., "[a]fter tonight I am not going to worry about you lying to me; you will be out of my life." Inside the club, Rushing cursed M.L, demanding that she take off her clothes. After she complied, he beat her on the buttocks, arms, back and leg with a broken pool stick, threatened her with a gun, stomped on her, and choked her while he stating that she needed to die. After over forty minutes of brutality, Rushing drove a barely conscious M.L. to her trailer. After arriving at her trailer, Rushing stated: "Well. I suppose that you don't want to f— now, huh?" M.L. declined his offer and after laying across the hood of his car to compose herself, went into the trailer.

After she removed her clothes, got into bed and declined Rushing's further advances, she drifted in and out

of consciousness, until after daybreak when her aunt called. Because Rushing was in bed beside her, M.L. did not tell her aunt about his attack at the club. After the call when Rushing requested sex a third time, the M.L. testified that they had the following exchange:

> I kept telling him no. Well, we did have sex. He kept on messing with me. And he told me, he said, Well, I don't want you half f****** me. And then he said, You really don't want to do this, do you? I said, No, I don't. He said, Well, if want to f~"", I am going to have to go somewhere else? I said, Yes, you do. I laid down on the bed. And I laid back down on the bed and he told me, he said, Well, you are going to f*** me before I leave here, even if it's the last time.
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After this conversation, M.L. relented, believing that he would not leave her alone until she had sex with him. Later that evening, her aunt came to her home and drove her to the hospital. The police officer dispatched to the hospital observed bruises on M.L.'s arms and legs. Later on the evening of February 3, 1997, M.L. filed charges against Rushing. On a return trip to the hospital to undergo a sexual assault examination, the examining nurse noted a red mark on her neck and bruises to her buttocks, left thigh and upper arm. An x-ray further revealed a broken finger.

For his part, Rushing testified at trial that while they were at the club, discussing the missing appliances, M.L. came at him with the broken pool cue. He stated that as he stood up, he accidentally knocked her back. He claimed that he hit her with the cue stick no more than four times and denied that he required her to disrobe and that he stomped or choked her. According to Rushing, the next morning, as a way to apologize for lying about the appliances, M.L. initiated sex with him, during which he noticed no bruises on M.L.

Rushing was represented at trial by Attorney Pat Jordan, whereas the State was represented by Assistant

District Attorneys Greg Malta and Rick Fortenberry. The Honorable Robert W. Bailey. Circuit Judge, presided at the trial.

IV. DISCUSSION OF ASSIGNED ERROR AND THE APPLICABLE LAW

A. Issue One- Sufficiency of the Evidence (Petitioner's Grounds B, I, L and M)

The inquiry pertinent to Rushing's claim of insufficient evidence to support his rape conviction2 is "whether, after reviewing the evidence in the light most favorable to the

(**Fn. 2** Given that the Mississippi Court of Appeals reversed and remanded Rushing s aggravated assault conviction, any challenge to that conviction is moot.)

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); Hughes v. Johnson, 191 F.3d 607, 619 (5th Cir. 1999) (quoting Jackson). The court, "in applying this standard... refers to the state's criminal law for the substantive elements of the offense." Hughes, 191 F.3d at 619.

On direct appeal, Rushing made the following argument regarding the sufficiency of the evidence on the rape charge:

> Rushing argues that the evidence was insufficient to support the jury verdict finding him guilty of forcibly raping the victim because no contemporaneous force was used, the victim had many opportunities to seek aid, assistance, and flee from Rushing, the victim had had a long-term sexual relationship with Rushing, the victim had waited nearly twelve hours after the attack to report the rape, and the victim had denied she had been raped when first questioned by an officer.

Rushing, 753 So. 2d at 1142.

The Mississippi Court of Appeals rejected this argument, stating:

> Rushing was convicted under Miss. Code Ann. § 97-3-65(2) (Rev.1994) which provides:
>
> > Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person s consent....
>
> Reviewing the evidence in the light most favorable to the State, we find the evidence was sufficient to establish and to support the three elements necessary to prove rape, i.e., (a) carnal knowledge, (b) without consent and by force, and (c) of a female age fourteen or upward. Halley v. State, 537 So. 2d 411, 414 (Miss.1988).
>
> As the Mississippi Supreme Court noted in Hull v. State, 687 So.2d 708, 723 (Miss. 1996):
>
> [O]ne of the elements of rape is that it is done "without consent and by force, While this is true, this Court stated in Stewart v. State, 466 So.2d 906 (Miss.1985):

> The well-settled rule is that in a prosecution for rape, physical force on the part of the assailant or physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of great bodily harm.
>
> Thus, proof that Rushing used additional, contemporaneous force to have sexual intercourse with M.L. is unnecessary if the evidence establishes

that she surrendered because of fear arising out of a reasonable apprehension of great bodily harm. The evidence established that the victim was cursed, severely beaten while nude, and threatened with a gun before she was returned to her trailer. The victim drifted in and out of consciousness throughout the remainder of the night and early morning. Although no contemporaneous force was inflicted upon the victim, the jury could reasonably find that the victim submitted to sexual intercourse with Rushing out of fear that to resist would cause Rushing to further inflict bodily injury upon her. Indeed, the victim stated her belief that Rushing would not leave her alone, or leave, until he had sexual intercourse.

Rushing contends that M.L. consented to sexual intercourse. Rushing suggests that the fact M.L. had the opportunity to seek, aid, assistance or to flee from him and did not do so, is consistent with acts of consensual intercourse. While the jury might appropriately consider these matters on the issue of consent, they were not dispositive. These matters must be weighed against the evidence offered in opposition to Rushing's suggestion of consensual intercourse.

The most important part of that evidence was the testimony of M.L. wherein she (1) denied having engaged in consensual intercourse, (2) stated that Rushing had, "beat me half senseless", and (3) stated her belief that Rushing would not leave her alone or leave her, until he had intercourse with her.

The conflict in testimony merely raised a question of credibility. Questions of credibility are to be resolved by the finders of fact, the jury. Eakes v. State, 665 So. 2d 852, 872 (Miss. 1995). When the record contains credible evidence consistent with the jury verdict, this Court is obligated to affirm that verdict. Holmes v. State, 660 So. 2d 1225, 1227 (Miss. 1995),

> unless to do so would work an unconscionable injustice. White v. State, 732 So. 2d 961 (Miss. 1999).
>
> Based upon the record before it, this Court finds that substantial credible evidence existed upon which the verdict could have found Rushing guilty of rape. Holmes v. State, 660 So. 2d 1225, 1227 (Miss. 1995). This assignment of error is without merit.
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Rushing, 753 at 1142-43.

Clearly, the state court applied the same standard to the evidence as set forth in Jackson, noting that it was the jury's duty to determine the credibility of witnesses. The undersigned has reviewed the evidence and finds that the state court's decision was not an unreasonable application of Jackson to the facts in this case. As set forth by the court of appeals, there was evidence from which a reasonable juror could conclude that M.L. surrendered to Rushing because of fear arising out reasonable apprehension of great bodily harm. The jury heard and obviously believed her testimony to the effect that Rushing had savagely beaten her the night before and that in light of the beating, she thought that he might do the same if she continued to resist him. As the Mississippi Court of Appeals did not unreasonably apply Jackson, habeas relief may not be granted based on this issue.

B. Issue Two- Ineffective Assistance of Counsel (Petitioner's Grounds A and F)

In considering his post-conviction motion, the Mississippi Supreme Court considered Rushing's allegations that his trial counsel was constitutionally ineffective. That court rejected the claims with only a brief statement pronouncing them to be without merit. This being said, the undersigned is aware that the Mississippi Supreme Court analyzes all Sixth Amendment claims

under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), the "clearly established" law for claims of ineffective assistance of counsel. Under Strickland, a claim of ineffective assistance of counsel may only be sustained upon proof that trial counsel s performance was deficient, and trial counsel's deficiency resulted in an unfair trial. 466 U.S. at 687. Both the "deficiency" and..the"prejudice" prongs must be satisfied, or it cannot be said that

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the adversarial process was so lacking that it rendered an unreliable result, thereby denying a petitioner a fair trial..See id. at 687. To prevail on his claim, Rushing must overcome the presumption of "reasonable professional assistance" by showing counsel's errors prejudiced his defense to such a degree that there exists a reasonable probability if those errors were not committed by counsel, Rushing would not have been convicted. See. at 689-694 (holding a "reasonable probability is a probability sufficient to undermine confidence in the outcome"). Counsel is presumed to have given competent assistance, and a petitioner must overcome that presumption by demonstrating counsel s actions were not within the province of a reasonable trial strategy. See id. at 689 (to prevail on claim of ineffective assistance of counsel, petitioner must demonstrate counsel s representation fell below an objective standard of reasonable competence as a result of which he was prejudiced). Obviously applying Strickland to Rushing's claims regarding his attorney, the Mississippi Supreme Court found that no constitutional violation existed. Thus, unless the Mississippi court's decision was unreasonable application of Strickland, no habeas relief may be granted.

Rushing first charges that counsel was not prepared for trial, urging that trial counsel failed to obtain and use police reports, rape kit, emergency room records as well as a statement by the victim in which she indicated the sex was consensual; did not issue subpoenas or view photographs until the day before trial; failed to develop sexual history between petitioner and victim; and failed to

introduce information regarding the paternity of victim's child. From the undersigned's review of the record, it is clear that counsel was aware of the contents of both the hospital and police reports, as well as the negative results of the rape kit. It is clear that his decision not to introduce these items into evidence was part of his trial strategy.

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Where a record is utterly silent with regard to strategy, a reviewing court will presume counsel's action or inaction to be the product of strategy. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). As the state points out, "[d]efense counsel likely chose to take his chances with the inference of a negative rape kit as opposed to putting the doctor who conducted the examination on the stand who could have testified that a sexually active woman of the victim's age would not necessarily display signs of vaginal trauma following a rape." Further, the record demonstrates that M.L. and Rushing had been sexually involved for five-years, such that it is unclear what additional testimony on this issue would have added to the jury's consideration. Finally, where Rushing does not deny that he assaulted M.L. with the pool, the paternity of the child that M.L. claimed to be Rushing has little on whether defendant assaulted M.L. to such a degree that she feared further reprisals if she did not have sexual relations with him the next morning. Jordan cannot be deemed deficient for failing to raise the issue.

Rushing next asserts that Jordan was ineffective because he failed to file a motion to sever the aggravated assault charge from the rape charge. However, as the two-count indictment is permissible under Mississippi law, see Miss. Code Ann. § 99-7-21, Jordan was not deficient for failing to file a motion to sever. The "failure to raise meritless objections is not ineffective lawyering; it is the very opposite." Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994). The failure to assert a meritless objection cannot be grounds for a finding of deficient performance. Emery v. Johnson, 139 F.3d 191, 198 (5th Cir.1997) (citing Clark, 19 F.3d at 966).

Rushing further complains that defense counsel failed to call as witnesses, the doctor who performed the rape kit and a utility worker who knocked on M.L' s trailer door and talked to her while Rushing was still there. As stated previously, Jordan's decision not to call the doctor was

trial strategy. Moreover, where the victim admitted that she did not disclose her circumstances to the utility worker, his testimony would have added little to the jury's consideration. Complaints of uncalled witnesses are not favored in a federal habeas corpus court because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative. McCoy v. Cabana, 794 F.2d 177, 183 (5th Cir.1986). Relief is not warranted on this basis.

Rushing also takes issue with his counsel's performance during the cross-examination of M.L. According to Rushing, he did not adequately cross-examine her and did not attack her veracity. Specifically, he complains that counsel did not ask M.L. if she had been forced to have sex, failed to point out that the victim stated that she had been restrained at the club, but was not restrained at the trailer and failed to properly inquire about her inconsistent statements on the question of rape. However as recognized by the state, given that the prosecution's theory of the case was that the victim submitted to the rape due to the fear engendered as the result of the severe beating by Rushing the night before at his club, it was entirely logically that Jordan would not ask M.L. if Rushing "forced" her to have sex. Further, the record shows that M.L. admitted that at the hospital, when she initially asked about a possible sexual assault, she responded in the negative. The inconsistency was before the jury and the jury apparently credited M.L.'s testimony regarding the reason for her initial negative response as well as her version of the night's events.

Next, Rushing asserts that Jordan was ineffective for failing to object to the prosecution's frequent reference to his nickname "Devil Catcher" and that Jordan did not adequately argue his motion for a directed verdict. Here, the record reflects that Rushing was known by the victim

and the community by this name. Defense counsel promptly explained to the jury that it was Rushing's CB handle. Assuming arguendo that Jordan should have objected to the use of the nickname, given that the victim knew Rushing by this name and that the nickname itself was not suggestive of a criminal disposition, the court does not perceive that the use of the nickname was highly prejudicial to Rushing. Cf. United States v. Roberson, 124 Fed. Appx. 860 (5th Cir. 2005) (examining the propriety for using a nickname during trial). Further, the court has reviewed the record wherein Jordan argued for a directed verdict as to the rape charge. Jordan's argument was consistent with the defense theory—Rushing did not force M.L to have sex with him. There was no deficiency or prejudice in this regard.

Rushing also complains that Jordan failed to offer an instruction which would have defined "forcible" in the context of rape and one which defined "feloniously. He also charges that Jordan failed to object to improper jury instructions. The trial court gave the following instruction on rape:

> The Court instructs the jury that should you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. On or about the February 3, 1997, in Lauderdale County, Mississippi;
>
> 2. The defendant, James R. Rushing, a male person over the age of 18 years, did willfully, unlawfully, feloniously and forcibly engage in sexual intercourse with Marilyn Lynch without her consent, then it is your

sworn duty to find the defendant, James R. Rushing, guilty of rape under Count II of the indictment in this cause.

Should the State fail to prove any one or more of these essential elements beyond a reasonable doubt, then you shall find the defendant, James R. Rushing, not guilty under Count II of the indictment in this cause.

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As the State points out, this instruction was not contrary to the rape statute as existed at the time that Rushing was indicted.(**FN**3) Given that any proper instruction on the "force" element would have explained to the jury that "physical force on the part of the assailant or physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of great bodily harm," Jordan cannot be deemed deficient for falling to request an instruction that would have served to present the prosecution's theory of the case.

During its deliberation, the jury did request a definition of "feloniously." After defense counsel, for reasons not stated in the record, rejected the prosecution s proposed definition, derived from Black's Law Dictionary, the court informed the jury that a definition could not be provided. Assuming arguendo that Jordan erred by failing to provide a definition , the undersigned is not persuaded that Rushing was prejudiced by the failure. That is, where the instructions on the whole accurately stated the law, Rushing has not shown that, but for the lack

(**Fn 3** On the day that Rushing was indicted, Miss. Code Ann § 97-3-65(2) provided:
Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person s consent, by administering to such person any substance or

liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.)

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of an instruction defining "feloniously,"(**FN4**) he would not have been convicted on the rape charge. Finally, the record indicates that Jordan did object to numerous jury instructions offered by the state, including the one upon which the Court of Appeals reversed his conviction for aggravated assault.

Lastly, the undersigned concludes that petitioner's assertion that Jordan failed to make a Batson challenge is without merit. As the State points out, Rushing has utterly failed to "make particularized allegations or to identify probative evidence in the record tending to support his allegations." United States v. Flores, 125 F. 3d 1000, 1006 (5th Cir. 1998). He has not directed the court's attention to any specific juror who was wrongfully excluded from the jury pool and has not offered any meaningful argument that the prosecution improperly utilized its peremptory strikes. Certainly, he has not shown that Jordan was deficient by not raising this issue.

Having reviewed the trial record, the undersigned finds no deficiencies in counsel's performance. Applying the standard of review required by AEDPA. the undersigned further finds that the state's application of the law [i.e., the Strickland standard] to the facts in Rushing's case was clearly not unreasonable in light of the evidence. Rushing attorney's representation was vigorous and comprehensive. As both the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized, a criminal defendant is not constitutionally entitled to a perfect trial, just a fair one. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); Sawyer v. Butler, 848 F.2d 582, 594 (5th Cit 1988).

A review of the record confirms the undersigned's conclusion that Rushing did receive a fair trial, represented by adequate counsel and thus, that the

(Fn 4"The term 'feloniously means unlawfully with the intent to commit a felony-grade crime." Winston v. State, 127 Miss. 477,484-85 (Miss. 1921).)

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Mississippi courts did not unreasonably apply Strickland. Relief is not warranted as to this issue.

C. Issue Three- Prosecutorial Misconduct (Petitioner's Grounds C, N and O)

According to Rushing, in obtaining his conviction, the prosecution used unfair and irrelevant tactics and also "dominated" the victim. He further complains that the prosecution improperly referred to him as "Devil Catcher" throughout the trial. Although he fails to say as much in his petition before this court, by unfair and irrelevant" tactics, Rushing apparently refers to his belief that the prosecution and the Meridian Police Department intentionally charged him with rape and aggravated assault to extract a plea on the aggravated assault charge. By his accusation that the prosecution "dominated" the victim, Rushing apparently is proceeding on a theory that the State scripted M.L.'s trial testimony and later "persuaded" her to recant the deposition testimony that she gave in connection with Rushing s application for post-conviction review. In her deposition, M.L. recanted her trial testimony that Rushing raped her. The Mississippi Supreme Court rejected these claims, and the undersigned finds that its decision in this regard does not amount to an unreasonable application of clearly established law. As the State points out, the record does not substantiate either of Rushing's charges of improper conduct related to the decision to charge Rushing with aggravated assault and rape or of "dominating" the victim during either the trial or during the post-conviction proceedings; nor has Rushing purported to offer any new evidence (or argument on this issue) in support of these assertions to this court.

Regarding the prosecution's references to "Devil Catcher" given that trial counsel explained that the moniker was Rushing's C.B. handle and that the name is not particularly

suggestive of criminal activity, Rushing has not demonstrated that the use of "Devil Catcher" during trial was harmful to him; that is, he has not shown that it rendered his trial fundamentally unfair. See United States v. Rodriguez, 43 F.3d 117, 124 (5th Cir. 1995) (prosecutorial remarks "must be more than undesirable or condemnable; they must be so pronounced and persistent as to cast serious doubts on the verdict"); Ortega v. McCotter, 808 F.2d 406, 410 (5th Cir. 1987) (remarks must have been a "crucial, critical, highly significant factor in the jury s determination of guilt"); United States v. Parker, 877 F.2d 327, 332 (5th Cir. 1989) (in determining whether defendant s due process rights were violated by prosecutorial misconduct, first inquiry is whether the prosecutor s comments were indeed improper; the second is to evaluate whether the comments were harmful). In light of the foregoing, Rushing is not entitled to relief as to this issue.

D. Issue Four- Jury Instructions
(Petitioner's Grounds H, F, G, H and M)

Rushing makes a two-prong attack on the jury instructions. First, he contends that instructions C-7 and C-9 were improper, thereby denying him a fair trial. Secondly, he again complains that his right to a fair trial was deprived because the jury was not provided a definition of "forcible" or "feloniously." The State argues, and correctly so, that neither of these arguments provides a basis for habeas relief.

Generally, challenges to jury instructions may not form a basis for federal habeas corpus relief. Gilmore v. Taylor, 113 S. Ct. 2112, 2118-19 (1993). Only if an instruction was so unfair as to rise to the level of a constitutional violation would relief be appropriate. Id. A jury instruction should not be given when the charge is not

supported by the evidence, and due

process does not require otherwise. Hopper v. Evans, 456 U.S. 605, 611(1982). Petitioner s arguments regarding the jury instructions only related to purported errors of state law, even though the Petitioner has attempted to frame them as constitutionally deficient. The Mississippi Supreme Court may interpret its own law, and this court does not sit as a superior state court to review supposed errors of state law. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state law questions." Trevino v. Johnson, 168 F.3d 173, 184 (5th Cir. 1999).

Only if any of these errors so unfairly prejudice his trial so as to render it fundamentally unfair would it violate Rushing's Due Process rights. The issue for this Court is not whether state law was violated, or whether any error prejudiced the petitioner. The issue is whether the giving of the instruction or the failing to give the instruction "so infected the entire trial that the resulting conviction violates due process." Galvan v. Cockrell, 293 F.2d 760 (5th Cir. 2002). Even then, the undersigned's review is limited to determining whether the state court's decision was an *unreasonable application of clearly established federal law*, or contrary to such law, under AEDPA.

Here, the undersigned finds that the claims regarding the jury instructions simply are not of a constitutional magnitude and that the state court's decision is entirely reasonable and violates no federal law. Instructions C-7 and C-9 instructed the jury on the aggravated assault charge. As set forth above, the Mississippi Court of Appeals concluded that C-7 was improper and upon this conclusion, reversed Rushing's aggravated assault conviction. Rushing argues that if the jury had been properly instructed on the aggravated assault charge, they could not have found him guilty of the rape charge. This argument essentially challenges the sufficiency of the

evidence. As the undersigned set forth supra at p. 13-16, the state court decision regarding the sufficiency of the evidence on the rape charge does not constitute an unreasonable application of Jackson, and thus, no relief is warranted. Likewise, in connection with evaluating petitioner's ineffective assistance of counsel claim, the undersigned has addressed the lack of jury instructions defining "feloniously" and "forcibly," concluding that where the instructions on the whole correctly set forth the elements of rape, any failure on Rushing's attorney's part to proffer these definitions did constitute ineffectiveness. Similarly, by refusing to provide the jury with these definitions, the trial court did not deny Rushing a fair trial. Accordingly, the undersigned finds that the appellate court s decision denying relief was not unreasonable or incorrect and thus, that relief should be denied as to this ground.

E. Issue Five- Actual Innocence/New Evidence (Petitioner's Grounds E,H, O, Q and R)

In Issue Five, petitioner argues that the trial court erred in denying him a new trial as was sought by his motion for post-conviction relief. According to Rushing, the new evidence presented to the trial court during the evidentiary hearing on his motion for post-conviction review establishes that he was actually innocent of the rape charge. At this hearing, Rushing presented two affidavits from and the deposition testimony of M.L., wherein she stated she recanted her trial testimony regarding the rape. For its part, the State presented a more recent affidavit from M.L. In the affidavit that the State presented, M.L. recited, in part, that

> [t]he deposition I gave to Mr. Rushing's attorney was given because I was feeling sorry and a little guilty for Mr. Rushing. I was tired of all the phone calls I was getting day and night just about every day until my phone was turned off. His friends were always asking why I did it and trying to make me feel bad.

> But after thinking long and hard about it, I couldn' t live with
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> myself if I told a lie and changed my testimony. At least now I still have my self-respect and dignity for sticking with the truth.

Neither side called upon M.L. for live testimony, and after receiving the evidence, the trial court ruled as follows:

> This Court has considered the trial testimony of the victim, along with her recanted testimony contained in the affidavits submitted and the deposition taken, as well as the affidavit she provided to the District Attorney. The Court is confident that she testified truthfully at trial and in her affidavit made on August 20, 2001. The victim stated in her affidavit that she was tired of the calls she was receiving and that she could not live with herself if she did not tell the truth. The Court is also of the opinion that the victim bent to pressure from the Petitioner and others in recanting her trial testimony. This Court does not know what the victim would have stated had she been called to testify at the evidentiary hearing and will not speculate to what she might testify. The Court is of the opinion that the recanted testimony is material, but that because the victim has now stated that it was in fact rape, along with her reason for recanting her testimony and because she did not testify at the evidentiary hearing, the Petitioner has not proven that a different result would be reached if a new trial was provided. Therefore, the Motion for New Trial is hereby denied.

As the State correctly points out, absent an independent constitutional violation occurring in the state trial, actual innocence based on new evidence relevant to the guilt of a state prisoner is not cognizable on federal habeas corpus. Herrera v. Collins, 506 U.S. 390, 400, 404

(1993); Graves v. Cockrell, 351 F.3d 143 (5th Cir. 2003); Jacobs v. Scott, 31 F.3d 1319, 1324 (5th Cir. 1994). Instead, actual innocence is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 404. As petitioner does not assert actual innocence in an effort to overcome a procedural bar, he has failed to state a claim on which the court may grant relief and the claim is subject to dismissal.

F. Issues Six, Seven and Eight- State Law Errors (Petitioner's Grounds J K, M and Q)

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Rushing's contentions in Issues Six through Eight generally raise claims regarding Mississippi law, and these do not rise to the level of constitutional violations. Further, the Court of Appeals and the Mississippi Supreme Court considered and rejected these assertions on the merits. Unless Rushing can show that the court s decision was an unreasonable application of clearly established federal law, no habeas relief can be granted. The undersigned finds that the state courts, in rejecting these contentions, violated no federal law.

For example, Rushing contends that the trial court erred in denying his motion to exclude the testimony of the victim's son, R.L., because the prosecution failed to timely disclose its contents in violation of Rule 9.04 of the Uniform Rules of Circuit and County Court Practice. According to the petition in this court, this had the effect of denying him the right to confront a witness and the right to a fair trial. At trial, R.L. testified that: (1) Rushing offered to give M.L. money, a house and car repairs, if she would drop the charges; (2) Rushing admitted he had hit M.L.; and (3) Rushing denied raping M.L. The Mississippi Court of Appeals found a technical violation of the rule, but concluded that the error was harmless, apparently because both parties had indicated that they would call R.L. as a witness. The record reflects that R.L was subject to cross examination on the "valuable offers." And Rushing himself testified that he had made offers of money and a house to

M.L. in an effort to support their child, not as an incentive to drop the charges. Rushing was neither denied the right to confront R.L. or the right to a fair trial, and his effort to somehow recast this state law error as a constitutional infirmity fails.

Issue Seven involves the trial court' s exclusion of M.L.' s written statement to the investigating officer. This is a simply an evidentiary matter, which is ordinarily not a basis for habeas relief. A federal court in a habeas corpus petition reviewing state evidentiary rulings does

not sit as a superior state supreme court to review error under state law. Bridge v. Lynaugh, 838 F.2d 770 (5th Cir. 1988). An evidentiary error in a state trial does not justify federal habeas corpus relief unless it is of such magnitude as to constitute a denial of fundamental fairness under the Due Process Clause. Id. at 772. Here, on appeal, the Mississippi Court of Appeals concluded that the trial court was within its discretion in refusing to admit the written statement and observed that Rushing was not deprived of his opportunity to cross-examine both M.L. and the investigating officer regarding her initial statement to the effect that she had not been sexually assaulted.

In Issue Eight, Rushing charges that his due process rights were violated by the trial court s failure to sever the counts of the indictment and try him separately on each count. Although he offers no further argument on this issue in his petition before this court, in state court, Rushing took the position that because the assault and rape were separate incidences which occurred at different locations, the failure to sever these charges was a violation of Mississippi Code Ann.§ 99-7-2(1) **FN5** Simply put, this alleged error of state law does not rise to the level of a constitutional deprivation and therefore, is not subject to review by this court. As these claims fail to provide a basis for habeas relief, they should be dismissed.

V. CONCLUSION

(**Fn 5** This section provides, in pertinent part, that two or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based upon the same act or transaction; or (b) the offenses are based two or more acts or transactions that connected together or constituting parts of a common scheme or plan.)

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For the reasons discussed above, the undersigned recommends that the petition should be dismissed with prejudice.

The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendation contained within this report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. 28 U.S.C.§ 636, Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1428-29(5th Cir. 1996).

RESPECTFULLY SUBMITTED, this the 8th day of February, 2008.

s/ James C. Sumner
UNITED STATES MAGISTRATE JUDGE